FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. 564

TUCKER PRODUCTS CORPORATION,
Petitioner,

vs.

GEORGE S. HELMS, HAROLD T. THRASH, GEORGE S. HELMS and HAROLD T. THRASH, as co-partners, doing business under the firm name and style of George S. Helms and Harold T. Thrash,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Respondents, George S. Helms and Harold T. Thrash respectfully allege:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The summary statement of petitioner is, for the purposes involved in the instant petition, acceptable as a statement of fact, save and except that on page 2 of its petition petitioner states: "The complaint alleges that petitioner established credit at the Bank of California and sets forth *in haec verba* the document which established said credit" (Tr. 5).

This is not a correct statement of fact, for the document petitioner adduced in evidence in support of Paragraph V of petitioner's complaint (Tr. 5) was a letter from the Bank of California at San Francisco, addressed to Meyers Sales Co., Mr. Harold T. Thrash, Mr. George S. Helms, 112 Market street, San Francisco, California, which commenced with the following sentence, to-wit: *"This letter is solely an advice and conveys no obligation or engagement on our part."* The rest of the letter is as quoted on page 5 of the transcript of record and signed "Very truly yours, C. E. Meyer, Assistant Manager, Foreign Department;" as amended herein, it is correct.

It is correct that respondents filed a supplemental answer and special defense in which respondents asserted that petitioner represented as an inducement to the so-called agreement, that petitioner would deposit in the Bank of Covelo at Covelo, California, an irrevocable letter of credit in the sum of $80,000.00, and that petitioner failed—and the trial Court found that it had failed—to establish said letter of credit whereby respondents were prevented from performing their part of the contract (Tr. 19-20). These last

mentioned facts were established by independent and irrefutable evidence upon trial.

QUESTIONS PRESENTED AND REASONS RELIED UPON FOR DENIAL OF THE WRIT OF CERTIORARI.

The Court of Appeals for the Ninth Circuit did not abuse its sound discretion in denying petitioner's petition for an extension of time and in dismissing the appeal.

ARGUMENT.

IT IS NOT AN ABUSE OF DISCRETION FOR THE COURT OF APPEALS TO DENY PETITIONER'S MOTION FOR EXTENSION OF TIME AND TO DISMISS THE ACTION.

Counsel for the respondents submit that there is in fact one simple question before the honorable Court on the matter of this petition for writ of certiorari, namely, did the Court of Appeals of the Ninth Circuit abuse its discretion in denying appellant and petitioner's motion for an extension of time.

Petitioner admittedly did nothing whatsoever to perfect its appeal after filing its notice of appeal and designation of record. The Clerk of the District Court secured such orders extending time as were within the provisions of the District Court, within the extreme time limit permitted by Rule 73 (g) of the Federal Rules of Civil Procedure, that is, 90 days. Petitioner did not inquire as to its case or even pay the necessary fees in order to file and docket its ap-

peal in the Court of Appeals (Tr. 29-30, p. 4, of petitioner's brief). Petitioner attempts to excuse itself upon the ground of the excusable neglect of Norman Leonard, Esq., because he was preoccupied and engaged in other matters. Norman Leonard, Esq., states in his affidavit accompanying petitioner's motion for extension of time, that he received a telephone call from the Clerk of the District Court on November 26, 1948, (Tr. 30)—106 days after notice of appeal had been filed—advising him that petitioner had not paid the necessary fees in order to file and docket the record (Tr. 30). He admittedly took no interest in attempting to perfect the appeal until after this telephone call.

Harold M. Sawyer, Esq., appeared in Court for petitioner upon motions prior to trial, including setting the cause for trial. Norman Leonard, Esq., signed the complaint for his firm, but did not conduct the trial of this case for petitioner. Petitioner was represented upon trial by George R. Andersen, Esq., a member of the firm of Gladstein, Andersen, Resner and Sawyer; notice of appeal was signed "Gladstein, Andersen, Resner and Sawyer, by George R. Andersen, Norman Leonard, Attorneys for Plaintiff" (Tr. 22); the affidavit in support of notice of motion for extension of time in the Court of Appeals was sworn to by Norman Leonard, Esq. (Tr. 30); likewise the petition for a rehearing in the Court of Appeals and the supporting affidavits are sworn to by Norman Leonard, Esq. (Tr. 39, 40, 41, 43, 52). There is either no mention of, or affidavits by, Richard Gladstein, Esq., George R. An-

dersen, Esq., Herbert Resner, Esq., or Harold M. Sawyer, Esq., in explanation of what these gentlemen and their staff were doing in the critical period involved in the attempted perfecting of the appeal by Norman Leonard, Esq., whose notice of appeal is signed "Gladstein, Andersen, Resner and Sawyer, by George R. Andersen and Norman Leonard, attorneys for plaintiff (Tr. 22). Norman Leonard, Esq., in support of his motion for extension of time, states: "He is * * * one of the attorneys charged with the handling of the above entitled case." (Tr. 29.)

Norman Leonard, Esq., in his argument before the Court of Appeals upon the motion for extension of time, admitted that the only thing required to be done was to pay the necessary Clerk's fees; admitted there was no voluminous transcript which required any extensions of time upon the part of the Reporter and Clerk of the District Court in order to prepare it; admitted that the transcript of the trial testimony had been written up before judgment for the purpose of filing briefs in the trial Court. At the time of the hearing of the motion, when questioned by the Court of Appeals, he failed to satisfactorily answer the Court of Appeals as to what particular *litigation* caused *him* to be "preoccupied."

Petitioner's counsel, in his brief, extolls his virtue and the speed with which he filed notice of appeal and with which he filed designation of record, and thereby protests that he was diligent and not guilty of laches. He presents his speed in starting, and protests his lack of dilatoriness, even as the hare raced

with the tortoise. Petitioner states in his brief in support of his petition for a writ of certiorari: "No clerk has ever questioned the credit of counsel in such matter." (p. 16 of brief.) It is noted that the plaintiff and petitioner, upon trial of the action, failed to prove it had established credit (Tr. 19-20), and evidently had failed to establish credit with the Clerks of the Court. We submit that the Clerk of the District Court has no duty to act without proper payment of the Court fees. It is counsel's duty to follow his case and see that proper steps are taken by him. *Drybrough v. Ware*, 111 Fed. (2d) 548 (CCA 6.)

In *Maghan v. Young*, 154 Fed. (2d) 13 (App. D. C.), where the appellants were denied an extension of time and the action was dismissed, counsel for appellant opposed the motion to dismiss for excusable neglect; his explanation was, that counsel was professionally engaged in attention to other matters. The Court stated:

> "We think this is not an adequate reason to justify our exercise of discretion."

The Court in that case, citing *Burke v. Canfield*, 111 Fed. (2d) 526 (App. D. C.), said:

> "In *Burke v. Canfield* we did grant relief in a somewhat similar case, on the ground that the rules were new and that it was unlikely counsel had sufficiently acquainted themselves with their terms; but we were careful on that occasion to advise the Bar that we intended thereafter to exercise sparingly our discretion to save an appeal prosecuted in disregard of the rules. * * * The

> reasons advanced in the present case show neglect but failed to show excusable neglect."

In the case of *Tucker Products Corporation v. George S. Helms, et al.*, 171 Fed. (2d) 126 (CCA 9), the Court stated:

> "We do not regard such preoccupation in that litigation as a reasonable ground for neglect of the duties of officers of this court. ***Maghan v. Young,*** 154 Fed. (2d) 13 (App. D.C.)"

Petitioner's counsel (p. 16 of petitioner's brief) admit they have had much experience in appeals to the Court of Appeals, and to this honorable Court. They should know the rules by now.

Counsel for the petitioner endeavors to point out that Rule 17, sub-division 3 of the Court of Appeals of the Ninth Circuit requires a written motion to dismiss. We quote the following from the rule:

> "No motion to dismiss, *except on special assignment by the Court,* (emphasis ours) shall be heard unless previous notice has been given to the adverse party."

At the time of the hearing of petitioner's motion for extension of time, when respondents appeared in opposition thereto, and orally moved to dismiss the appeal (Tr. 31-32), petitioner made no objection to the appearance, opposition, and motion. It is further submitted, even where no motion to dismiss is lodged in a matter of this character, that under Rule 73 (a) of the Federal Rules of Civil Procedure, the Court

of Appeals may dismiss the appeal upon its own motion.

The respondents have perused the cases cited by petitioner and find that of those cited which concern relief for excusable neglect, with the exception of the cases cited in respondents' brief, there is either no reason assigned for granting relief, or the reasons advanced lacked persuasiveness or failed to show excusable neglect if denied; or, if granted, the litigant either had been diligent or the reason for the motion was because of confusion, and in the Court's opinion there was excusable neglect. It is further submitted that in matters discretionary with the Court, as in this case, each must stand upon its own facts as presented to the Court; that the facts submitted by the petitioner herein were not sufficient to justify relief by the Court of Appeals for excusable neglect.

In the case of *In Re Gamill,* 129 Fed. (2d) 501 (CCA 7), the Court stated that the record shows that appellant had been represented by three counsel, and no reason is shown why, if one were ill (or engaged in other matters) the others could not carry out the necessary steps in the case. The instant case seems to the respondents to be on all fours with *In re Gamill,* with the additional fact that there are at least five counsel in the firm representing the petitioner herein, and only one of them, by his affidavit, claims to have been "preoccupied" in other matters. In this case petitioner does not attempt to explain why even one of the co-counsel could not have watched the calendar

and perfected this appeal. It is to be noted that at least four of the five counsel have, at some time, personally appeared before the Court in this case. The Court in *In re Plankinton Building Co.*, 133 Fed. (2d) 900 (CCA 7) stated:

> "True it is, the mandatory requirements of Rule 73 (g) is alleviated in its rigidity by subsection (2) of the same rule which renders the failure to comply with subsection (g) non-jurisdictional * * * Nevertheless it is clear that the rules are expected to be followed, and unless reasons satisfactory to the Court are advanced as a basis for special relief from their provisions, the Court will take such action as it deems appropriate."

Respondents submit petitioner has shown no abuse of discretion upon the part of the Court of Appeals, but has in fact shown entire indifference upon the part of petitioner as to the rules upon appeal, and that such indifference is not excusable.

Dated, San Francisco, California,
March 2, 1949.

Respectfully submitted,
JAMES W. HARVEY,
Counsel for Respondents.

J. EMMET CHAPMAN,
FREDERICK C. DEWAR,
Of Counsel.